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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 783

CASSIUS MARSELLUS CLAY, JR.,
also known as MUHAMMAD ALI,

Petitioner,

—v.—

UNITED STATES OF AMERICA

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit is reported at 430 F.2d 165 and is set out in the Appendix (A. 236a). The opinion of the United States District Court for the Southern District of Texas is unreported (R.P. Vol. I, 50-59).*

The opinion of the Court of Appeals at an earlier stage of this case is reported at 397 F.2d 901 (A. 191a). Petitioner was originally convicted upon trial by jury in the United States District Court for the Southern District of Texas, and no opinion exists with respect to that conviction. The District Court denied petitioner's motion for acquittal

* "R.P." refers to the record of the proceedings in the District Court pursuant to the order of this Court in No. 271, O.T. 1968 remanding the case for a determination of whether illegal electronic surveillance of petitioner tainted his conviction. It consists of three volumes of the printed Appendix from the Court of Appeals.

after an oral finding of a basis in fact for petitioner's selective service classification (A. 186a).

Jurisdiction

The judgment of the Court of Appeals was entered on July 6, 1970 and a timely petition for rehearing and rehearing en banc was denied on August 19, 1970. Petitioner's time within which to file a petition for writ of certiorari was extended until October 3, 1970 and the petition was filed on October 1, 1970. Certiorari was granted on January 11, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional Provision and Statute Involved

The First Amendment to the United States Constitution provides in part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

Section 6(j) of the Universal Military Training and Service Act, 50 U.S.C. App. §456(j), provides:

> "Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views

or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections . . . shall, if he is inducted into the armed forces . . . be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of induction, be ordered . . . to perform . . . civilian work contributing to the maintenance of the national health, safety, or interest . . ."

Questions Presented for Review

1. Whether petitioner's conviction for refusal to submit to induction into the Armed Forces should be reversed because there was no basis in fact for the denial of his claim for a conscientious objector exemption? This question subsumes the issues:

   (a) Whether the finding by the Department of Justice that petitioner's beliefs were primarily "political and racial" rather than "religious" was erroneous and violated petitioner's religious freedom?

   (b) Whether the Department of Justice's conclusion that petitioner was not opposed to "participation in war in any form" is in conflict with this Court's decision in *Sicurella* v. *United States*, 348 U.S. 385 (1955), is based upon a constitutionally impermissible interpretation of religious doctrine, and improperly relies upon petitioner's objection to the Vietnam war?

   (c) Whether the Department of Justice erred in concluding that petitioner had failed to sustain the burden of establishing the sincerity of his claim by virtue of the lateness of its assertion and the

fact that he asserted other consistent claims for exemption at the same time?

2. Whether petitioner's conviction must be reversed because the Department of Justice's advice was erroneous with respect to at least one of the grounds upon which it recommended that petitioner should be denied a conscientious objector exemption?

Statement of the Case

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on June 20, 1967 of failing to submit to induction into the armed forces in violation of 50 U.S.C. App. §462. He was sentenced to five years imprisonment and a fine of $10,000. He had been indicted on May 8, 1967 for his refusal on April 28, 1967 to take the traditional "one step forward" which symbolizes induction into the armed forces.

Petitioner originally registered with Local Board No. 47 in Louisville, Kentucky on April 18, 1960 and on March 9, 1962 the board classified him 1-A (A. 3a). As a result of physical examinations which found him unacceptable for induction on January 24, 1966 and again on March 13, 1964 (F. 538, 539),* petitioner was classified 1-Y on March 26, 1964 (A. 3a). But, because of an apparent lowering of the Army's standard for induction (F. 530), petitioner's file was reexamined and without a further physical examination he was found fully acceptable for induction on January 26, 1966 (F. 529). The local board mailed peti-

* "F." refers to the page number of petitioner's Selective Service File, Government Exhibit No. 1 at the original trial (R. 139). "R." refers to the printed record of petitioner's trial originally filed in this Court in No. 271, O.T. 1968.

tioner notice of his acceptability on February 3, 1966 (A. 3a); he did not receive it, however, until February 12, 1966 (A. 11a).

In a letter dated February 14, 1966, petitioner sent to his local board what he referred to as a "request for pre-classification hearing" (A. 9a). He set forth certain information which he considered relevant to an expected reclassification, including his recent divorce and property settlement, the fact that he was the sole support of his mother, and the pendency of a criminal charge against him in Chicago. In addition, he stated:

> "That I am a devoit [sic] Muslim and a follower of the Islamic religious faith under the discipline of the prophet Elijah Muhammad. To bear arms or kill is against my religion and I conscientiously object to any combat military service that involves the participation in any war in which the lives of human beings is [sic] taken. This I do not believe to be rightous [sic]. This has been my faith upwards of 5 years." (A. 10a).

Three days later on February 17, 1966, however, the local board reclassified petitioner 1-A (A. 4a). Only on February 18, 1966 did the board respond to the information contained in petitioner's letter of February 14th by sending him a Special Form for Conscientious Objector (SSS Form No. 150 (A. 4a)). In the form, which he returned to the board on February 28, 1966, petitioner claimed an exemption on the basis of his conscientious opposition to both combatant and noncombatant training and service in the armed forces (A. 12a). He avowed his belief in a Supreme Being and briefly described his religious beliefs and duties as:

> "Muslim—meaning peace—total submission to Will of Allah. Do not take lives of anyone; nor war when not

ordered by Allah (God)—Keep up prayer and pay poor rates (A. 13a).

* * *

"Islam teaches peace. Allah (God) forbids wars, except when Islam is attacked. Holy Quran" (A. 15a).

He dated his conversion to Islam as January, 1964, by confession of faith in Miami, Florida (A. 15a), and in answer to the question concerning what behavior in his life demonstrated the depth of his religious convictions, he explained that:

"I divorced my wife whom I loved because she wouldn't conform to my Muslim faith. Gave up my christian name, and changed my name to Muhammad Ali, my religious name. Declined movie roles not consistent with my faith" (A. 14a).

He also stated that he believed in the use of force "only in sports and self-defense" (A. 14a).

The record of petitioner's appearance before the local board on March 17, 1966 reports that he stated that Muslims fight only in self defense, not war; that they have their own police force, and that no Muslim may carry any lethal weapon. The statement in this report that petitioner "objects to being in service because he has no quarrel with the Viet Cong," is immediately followed by the statement that "he could not, without being a hypocrit [sic], take part in anything such as war or anything that is against the Moslim [sic] religion" (A. 18a).

The board retained petitioner in class 1-A on March 17, 1966 and on March 28, 1966 he appealed its decision. (A. 4a). In his letter of appeal he asserted that he was entitled to a lower classification on medical grounds, for hardship reasons, and because "my religious beliefs decree

that I not serve in any military purpose to promote war. I reaffirm my stand thereon as my prior duty to Allah (God) the Supreme Being over all." (A. 21a).

On May 6, 1966 the Kentucky appeal board reviewed petitioner's file, tentatively determined that he should not be classified in class 1-O as a conscientious objector or in any lower class, and referred the file to the Department of Justice for an advisory recommendation and an FBI investigation (A. 4a-5a, F. 472). After the completion of the investigation, a special hearing was held on August 23, 1966 before former Kentucky Circuit Court Judge Lawrence Grauman in Louisville, Kentucky, at which petitioner, his mother and father, his tax attorney, and an assistant minister of Muhammad's Mosque No. 29 of Miami, Florida, testified (A. 22a-111a).

On the basis of this record, the hearing officer reported:

> "that the registrant stated his views for about one hour in a convincing manner; that he answered all questions propounded to him forthrightly; that there was no evidence of trying to evade . . . questions; and that he was impressed by the registrant's statements (A. 115a). . . . [He] believed that . . . the registrant was of good character, morals and integrity (A. 116a) . . . [and] concluded that the registrant is sincere in his objections on religious grounds to participation in war in any form and he recommended that the conscientious objector claim of the registrant be sustained" (A. 117a-118a).[1]

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[1] This report was never disclosed to petitioner or even made available to the appeal board even though it strongly supports his claim for exemption. *Cf. Brady* v. *Maryland*, 373 U.S. 83 (1963); *Gonzales* v. *United States*, 364 U.S. 59 (1960); *United States* v. *Purvis*, 403 F.2d 555 (2d Cir. 1968).

Despite this completely favorable report, however, the Department of Justice, in a letter to the appeal board from T. Oscar Smith, Chief of the Conscientious Objector Section, dated November 25, 1966, found that petitioner's conscientious objector claim was not sustained and recommended that he not be classified in class 1-O or in class 1-A-O as a conscientious objector to either noncombatant or combatant service (A. 127a). The Department rejected the claim on the ground that petitioner's beliefs did not satisfy the statutory requirements that they be based on "religious training and belief" and that they constitute objection "to participation in war in any form." It characterized petitioners' beliefs, based on the teachings of the Nation of Islam, as "political and racial" rather than religious; and concluded that petitioner did not oppose participation in all wars, but was only opposed to wars on behalf of the United States (A. 121a), and to the Vietnam war in particular (A. 124a). The Department also asserted that petitioner had failed to sustain his burden of showing that his beliefs were sincere because of his alleged failure to consistently manifest his conscientious objector claim (A. 127a).

On the basis of this recommendation, but without setting forth any reasons, the Kentucky appeal board classified petitioner 1-A on January 6, 1967 (F. unnumbered). After the return of his file from the appeal board, on January 12, 1967, the local board refused to reopen petitioner's classification and reclassify him to IV-D as a minister of Islam pursuant to his request of August 23, 1966 (A. 5a) At the request of the National Selective Service Director Hershey, however, on January 19, 1967 the board reopened petitioner's classification but again classified him 1-A (A. 5a-6a). Petitioner appealed to the appeal board for the Southern District of Texas (where he then resided) which, on February 15, 1967, affirmed his 1-A classification (F. unnumbered).

General Hershey appealed petitioner's classification to the National Selective Service Appeal Board which voted to classify petitioner 1-A on March 6, 1967 (A. 7a). Petitioner was ordered to report for induction on April 28, 1967, at which time he refused to submit.

At the subsequent trial, the District Court denied petitioner's motion for acquittal on the ground that there was a basis in fact for the denial of his claims for ministerial and conscientious objector exemptions. With respect to petitioner's conscientious objector claim, the court merely concluded:

> "I don't think he [petitioner] has said in so many words, 'I am an [sic] conscientious objector, I do not believe in killing or bearing arms and therefore I want to be assigned to noncombatant duty or to work of national importance under civilian direction'" (A. 190a).

On appeal, the Fifth Circuit quoted the passage from the Department of Justice's recommendation concerning the "political and racial" nature of the teachings of the Nation of Islam and the alleged objection only to certain wars; it quoted at length from what it termed "a penetrating analysis of the beliefs of the Black Muslims" which emphasized their allegedly anti-white, anti-Christian and segregationist philosophy; and it pointed out that the Justice Department had found that petitioner had not established the sincerity of his beliefs. Without further analysis, it found that "there was more than adequate evidence to justify the denial of his claim" (A. 227a).

A petition for certorari was filed in this Court on July 7, 1968. As a result of the Solicitor General's admission that five conversations of petitioner had been monitored by electronic surveillance, on March 24, 1969 this Court granted the petition for certiorari, vacated the Court of Appeals'

judgment, and remanded the case to the District Court for a determination of the effect of the surveillance on petitioner's conviction. *Giordano* v. *United States,* 394 U.S. 310 (1969).

The District Court held that petitioner's conviction had not been tainted, and on July 24, 1969 it entered a new judgment of conviction and resentenced him to five years' imprisonment and a $10,000 fine (A. 2a). On his second appeal to the Fifth Circuit, petitioner raised again all of the issues which had been decided against him on the first appeal, including the denial of the conscientious objector exemption. The Court declined to reconsider its prior decision, with the exception, however, of determining that the decision in *Welsh* v. *United States,* 398 U.S. 333 (1970) did not affect its disposition of petitioner's conscientious objector claim (A. 249a).

SUMMARY OF ARGUMENT

I

In order to support a claim for a conscientious objector exemption under §6(j) of the Universal Military Training and Service Act (hereafter referred to as the "Act"), a registrant is required to meet three basic tests. He must demonstrate that he is conscientiously opposed to participation in all wars; that this opposition is by reason of religious training and belief; and that he is sincere in his beliefs.

Petitioner was denied such an exemption in the present case as a result of a decision by a Selective Service board[2]

[2] After the Department's adverse recommendation, petitioner was classified 1-A by the appeal board for the Western District of Kentucky on January 6, 1967 (F. unnumbered), by Local Board No. 47 on January 19, 1967 (A. 5a-6a), by the appeal board for

which did not give any reason for its rejection of his claim. But the advisory opinion from the Department of Justice upon which this board relied, recommended that petitioner's claim be denied because of its failure to satisfy any of the statutory criteria. All of the Department of Justice's conclusions, however, were clearly erroneous and they cannot support the denial by the appeal board of a conscientious objector exemption to petitioner. Since there is no other basis in fact in the record for the denial of the exemption, petitioner's conviction should be reversed and the indictment dismissed.

The Department of Justice rejected the findings of the hearing officer that petitioner "is sincere in his objection on religious grounds to participation in war in any form" (A. 117a-118a). Indeed, it asserted that petitioner's beliefs did not satisfy the statutory requirements because they "rest on grounds which primarily are political and racial . . . [and] constitute only objections to certain types of war in certain circumstances . . ." (A. 122a-123a).

Petitioner submits that the Justice Department erred in its conclusion with respect to both the source and the content of his beliefs. Since the Nation of Islam clearly constitutes a religion within the meaning of the Act, the implicit determination that petitioner's beliefs were not "religious" was erroneous. The refusal to recognize that

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the Southern District of Texas on February 15, 1967 (F. unnumbered), and by the National Appeal Board on March 6, 1967 (A. 7a). Presumably, each classification insofar as petitioner's conscientious objector claim was concerned was based upon a review of the same evidence. For the purpose of our consideration here, it is immaterial that there was more than one denial of the exemption after the Justice Department's recommendation. If the Department's advice was erroneous, it is as likely to have infected all of the decisions as it would only one decision. Consequently, for convenience we will refer only to the denial of the exemption by the Kentucky appeal board.

the Nation of Islam is a religion under the Act also affronted the First Amendment's guarantee of religious freedom. Adherence by a registrant to unpopular "political and racial" doctrines as part of his religious beliefs cannot constitutionally provide the basis for discriminating against him with respect to the statutory exemption.

The conclusion that the contents of petitioner's views on war did not qualify him for the exemption was equally defective. Since the only war which the record reflects that petitioner was willing to participate in was a theocratic or holy war, the Department's conclusion that he was not opposed to participation in all war is in conflict with this Court's decision in *Sicurella* v. *United States,* 348 U.S. 385 (1955). Since it is the registrant's views on war that are central to his entitlement to the exemption, it was error for the Department of Justice to consider the doctrines of petitioner's religion in the face of his own unequivocal objection to participation in all wars. However, the doctrines of the Nation of Islam are perfectly consistent with petitioner's beliefs in that they prohibit participation in all war except theocratic war. The Department's contrary conclusion was based on an interpretation of the meaning and significance of religious doctrines that is forbidden by the First Amendment and is in conflict with this Court's decision in *Presbyterian Church* v. *Mary Elizabeth Blue Hull Church,* 393 U.S. 440 (1969). And to the extent that the Department relied on petitioner's expression of opposition to the Vietnam war to support its conclusion that petitioner merely objected to participation in a particular war, it also erred. Opposition to the war in Vietnam is consistent, rather than inconsistent, with conscientious objection to all armed conflict.

Finally, in its recommendation to the appeal board the Justice Department erroneously implied that petitioner

could not, as a matter of law, meet his burden of establishing his sincerity because of the lateness of the filing of his claim. It was also error for the Department to maintain that the appeal board could even consider lateness as evidence from which it could draw an inference of insincerity. Petitioner was not required to bring his claim to the attention of his local board any sooner than he did because he was unacceptable for induction for virtually the entire period from when his conscientious objections to war crystallized until when he did assert the claim. Petitioner's persuasive and fully corroborated explanation of why he did not file his claim until February, 1966, moreover, completely rebuts any inference of insincerity. And the fact that petitioner simultaneously sought several exemptions for different, but not inconsistent, reasons is totally irrelevant to the sincerity with which he asserted his conscientious objector claim.

II

Since no reason was provided by the appeal board for the denial of a conscientious objector exemption to petitioner, it is impossible to determine whether it concluded that petitioner's beliefs did not satisfy the statutory requirements because they were not "religious," because they did not constitute objections to all wars, or because they were not sincerely held. Inasmuch as petitioner clearly made out a *prima facie* case of his entitlement to the exemption, if any of the Department of Justice's advice upon which the appeal board *may* have relied was erroneous, his conviction must be reversed. The integrity of the Selective Service System can only be maintained if courts do not blindly endorse draft board decisions that are based upon errors of law. And serious criminal convictions cannot be supported by determinations so fraught with doubt.

ARGUMENT

I.

There Was No Basis In Fact For the Denial to Petitioner of a Conscientious Objector Exemption.

A. The Finding By The Department of Justice That Petitioner's Beliefs Were Primarily Political and Racial Was Erroneous and Constituted a Violation of the First Amendment.

That petitioner's opposition to war was the result of "religious training and belief" within the meaning of §6(j) of the Act cannot be doubted. It was never open to question that petitioner's beliefs were based on the doctrines of the Lost Found Nation of Islam, and it is clear that the Nation of Islam is a religion within the traditionally accepted meaning of that term. In the language of Chief Justice Hughes in *United States* v. *MacIntosh*, 283 U.S. 605 (1931):

> "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation" (283 U.S. at 633-34) (dissenting opinion).

And, in *Welsh* v. *United States*, 398 U.S. 333 (1970), after a careful analysis of the legislative history, Justice Harlan concluded that religion within the meaning of §6(j) meant at least the "formal organized worship or shared beliefs by a recognizable and cohesive group" (398 U.S. at 353) (concurring opinion).

It is unnecessary to belabor the point that the Nation of Islam falls within either of these conventional definitions, both of which are far narrower than the definitions or reli-

gion endorsed by this Court in both *Welsh* and *United States* v. *Seeger*, 380 U.S. 163 (1965). It is based on a belief in Allah as the Supreme Being, and the Koran or Holy Qur'an is the chief source of its dogma. The religious doctrines and rituals of the members of the Nation, also known as Muslims or Black Muslims, are derived largely from classical Islam, but their beliefs on certain fundamental points have clearly been shaped by the experience of the Black man in the United States.[3] Despite certain wide departures from the traditions of orthodox Islam, however, Elijah Muhammad, the Nation's spiritual leader, was welcomed to Mecca in 1960 by the powerful Hajj Committee, which is responsible for accepting or rejecting pilgrims journeying to the Holy City.[4]

Consistent with this country's tradition of religious tolerance, courts have not hesitated to recognize the Nation of Islam as a valid religion that is entitled to the same constitutional protection accorded to other religious movements.[5] As one federal court concluded:

"It is sufficient here to say that one concept of religion calls for a belief in the existence of a supreme being

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[3] C. E. Lincoln, *The Black Muslims in America* 219 (1961) [hereafter cited as Lincoln]. The Nation's formal organization can be traced to the early 1930s in Chicago, but its spiritual roots probably lie in the Moorish Science Temple Movement of Noble Drew Ali and the United Negro Improvement Association of Marcus Garvey, both of which flourished after World War I. *Id.* at 50. Ever since the early years of the movement Elijah Muhammad, known as the "Prophet" and the "Messenger of Allah," has been its spiritual leader. Under his guidance, the membership of the Nation of Islam has increased to what was conservatively estimated at 100,000 in 1961, with more than fifty temples in major cities from coast to coast. *Id.* at 217.

[4] B. E. Garnett, "Invaders from the Black Nation: The Black Muslims in 1970," p. 12, Special Report, Race Relations Information Center, Nashville, Tenn. (1970).

[5] *See Cooper* v. *Pate*, 382 F.2d 518 (7th Cir. 1967); *Walker* v. *Blackwell*, 411 F.2d 23 (5th Cir. 1969); *Sostre* v. *McGinnis*, 334

controlling the destiny of man. That concept of religion is met by the Muslims in that they believe in Allah, as a supreme being and as the one true god. It follows, therefore, that the Muslim faith is a religion" (*Fulwood* v. *Clemmer, supra,* 206 F. Supp. at 373).

Yet, faced with the overwhelming evidence that the Nation of Islam is a religion as well as with the conclusion of the hearing officer that petitioner's opposition to war was a result of "religious training and belief," the Department of Justice concluded that petitioner's opposition to war "insofar as it is based on the teachings of the Nation of Islam rests on grounds which primarily are political and racial" (A. 122a). In light of the fact that §6(j) expressly denies an exemption to registrants whose views on war are "essentially political, sociological or philosophical," there can be no doubt the appeal board would conclude that it was the Justice Department's opinion that petitioner should be denied an exemption because his views were "primarily political and racial."[6]

Read as a whole, the Justice Department opinion letter and the resumé of the FBI investigation reinforce the conclusion that the Department was of the view that petitioner's

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F.2d 906 (2nd Cir. 1964); *Sewell* v. *Pegelow,* 391 F.2d 196 (4th Cir. 1961); *Long* v. *Parker,* 390 F.2d 816 (3rd Cir. 1968); *Wallace* v. *Brewer,* 315 F. Supp. 431 (M.D. Ala. 1970); *Knuckles* v. *Prasse,* 302 F. Supp. 1036 (E.D. Pa. 1969); *SaMarion* v. *McGinnis,* 253 F. Supp. 738 (W.D. N.Y. 1966); *Banks* v. *Havener,* 224 F. Supp. 27 (E.D. Va. 1964); *Fulwood* v. *Clemmer,* 206 F. Supp. 370 (D. D.C. 1962) *cf. United States* v. *Freeman,* 388 F.2d 246 (7th Cir. 1967); *United States ex rel. Barr* v. *Resor,* 309 F. Supp. 917 (D. D.C. 1969).

[6] This was especially true before this Court made it clear in *Welsh* v. *United States,* 398 U.S. 333 (1970) that opposition to war that is based on political views or other beliefs that are nonreligious in the conventional sense does not automatically defeat a registrant's claim for exemption.

claim should be denied because it was not "religious." First, *United States* v. *Kauten*, 133 F.2d 703 (2d Cir. 1943) is the only case cited by the Department in support of its determination that petitioner's beliefs did not satisfy the statutory requirements (A. 123a). As this Court recognized in *United States* v. *Seeger*, 380 U.S. 163 (1965), *Kauten* was a case which held "that exemption must be denied to those whose beliefs are political, sociological or philosophical in nature, rather than religious" (380 U.S. at 178). Secondly, the Department did not refer to the Nation of Islam as a religion anywhere in the opinion letter. Not only did it studiously ignore any acknowledgement of the conventional religious aspects of the Nation, but it emphasized what it obviously considered its nonreligious characteristics. Thus, it characterized the teachings of the Nation of Islam as "political and racial objections to policies of the United States as interpreted by Elijah Muhammad" (A. 121a), and it pointed out that the essential views of the Black Muslims are "that the white man is their enemy, and that the black man should disassociate himself from the United States Government and its institutions and secure an independent nation for the black man within the United States" (A. 120a-121a). Finally, the discussion of the doctrines of the Nation of Islam contained in the FBI resumé mentioned only its allegedly anti-white attitude, the fact that some of its members have refused to register under the Selective Service Act, the existence of a "military-like" organization known as the Fruit of Islam, and the erroneous report that Muslims disclaim allegiance to the United States (A. 151a-152a).[7]

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[7] Muslims are directed to respect and obey the laws of the United States (A. 37a). See also Elijah Muhammad, *Message to the Blackman in America*, 163, 180 (1965) (Exhibit D to Special Hearing, A. 41a). It has been observed that Muslims are scrupulous in this obedience. Lincoln, at 248.

Indeed, on at least one occasion the Justice Department at its highest level has explicitly taken the position that the Nation of Islam is not a religion within the meaning of §6(j) of the Act. Thus, in his memorandum in opposition to the grant of certiorari in *Carson* v. *United States*, No. 398, O.T. 1969, the Solicitor General argued that a local board could properly deny a conscientious objector claim that was based on the teachings of the Nation of Islam because the registrant's "alleged opposition to war was not based on ethical principles but on essentially political views" (Memorandum for the United States in Opposition, p. 2). And in affirming that registrant's conviction the Fifth Circuit evidently accepted the Department's argument for it concluded that his beliefs "reflect an opposition to war which smacks of being essentially political, rather than religious . . ." *Carson* v. *United States*, 411 F.2d 631, 633 (5th Cir. 1969), *cert. denied*, 396 U. S. 865 (1969).[8]

The effect of the Department of Justice's letter, therefore, was to recommend that petitioner be denied a conscientious objector exemption on the ground that his opposition to participation in war was not "religious." Such a recommendation was clearly erroneous and cannot support the denial of petitioner's claim because, as we have pointed out, the Nation of Islam satisfies the accepted definition of religion within the meaning of the Act.

By refusing to recognize the Nation of Islam as a religion because of its allegedly "political and racial" teachings,

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[8] During petitioner's trial the United States Attorney even remarked that petitioner:

> "became converted to the Muslim faith in 1964. In my opinion that is where his troubles began. This tragedy and the sadness of having lost his title and having been convicted of a serious felony I think is because of his coming under the influence of the Muslim faith in the United States, which is just as much political as it is religious" (R. 355).

moreover, the Justice Department penalized petitioner because of what he believed, and it deprived him of the benefits of the statutory exemption afforded to the members of all other faiths. In so doing, the Department violated the governmental neutrality toward religion that is commanded by the First Amendment.

As this Court recently stated in *Epperson* v. *Arkansas*, 393 U. S. 97 (1968):

> "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine and practice. It may not be hostile to any religion or to the advocacy of nonreligion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion and religion, and between religion and nonreligion" (393 U. S. at 103-04).

Thus, the constitutional ideal is "absolute equality before the law, of all religions, opinions and sects," *Abington* v. *School District of Schempp*, 374 U. S. 203, 215 (1963), and the Government may not "penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities," *Sherbert* v. *Verner*, 374 U. S. 398 (1963); *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953). Local boards and courts, therefore, may no more reject the religious beliefs of a registrant because they consider them "political and racial" than they can because they consider them "incomprehensible." *United States* v. *Seeger*, 380 U. S. 163, 194-95 (1965); *see Washington Ethical Society* v. *District of Columbia*, 101 U.S. App. D.C. 371, 249 F.2d 127 (1957).

A central purpose of the First Amendment was to protect the adherents of unorthodox and unpopular faiths such

as petitioner's from persecution and discrimination at the hands of the majority. But on the record in this case, it cannot be said that just such persecution did not account for the Department's adverse recommendation and the subsequent denial of petitioner's conscientious objector claim. The Black Muslims have been commonly, although erroneously, thought to be a fanatical, extremist, black nationalist organization intent upon achieving political separation through violence. *See* E. U. Essien-Udom, *Black Nationalism* 308-323 (Paperback edition 1969). The fear, hatred and distrust that it has engendered among white people has often resulted in political and religious oppression, *see e.g., Wallace* v. *Brewer*, 315 F. Supp. 431 (M.D. Ala. 1970); *Fulwood* v. *Clemmer*, 206 F. Supp. 370 (D.D.C. 1962); *Muhammad Ali* v. *State Athletic Commission*, 316 F. Supp. 1246 (S.D. N.Y. 1970), that recalls that to which the Jehovah's Witnesses were subjected not long ago. *See e.g., Marsh* v. *Alabama*, 362 U. S. 501 (1946); *Fowler* v. *Rhode Island, supra; West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943); *Niznik* v. *United States*, 173 F.2d 328 (6th Cir. 1949). Indeed, the record in this case is replete with evidence of the hostility and resentment that was directed at petitioner both because of his race and his religious affiliation.[9]

The official hostility toward the Muslims has been shared by the federal government, which has itself been deeply involved in the investigation of the Nation of Islam for

[9] The FBI resume, for example, is full of examples of how people thought that the Muslims were hatemongers (A. 130a) who had brainwashed petitioner (A. 134a) and that petitioner was stupid to associate with them (A. 135a). In addition, petitioner's Selective Service file contains hundreds of letters and newspaper articles reflecting racial and religious prejudice against him (A. 233a). These documents had been sent to the local board and placed in petitioner's file pursuant to regulation (R. 175).

many years.[10] This investigation has included systematic FBI wiretapping and electronic surveillance of the Muslims, and around the clock wiretaps on the phones of the Muslim spiritual leader, Elijah Muhammad.[11] Indeed, Mr. Hoover has called the Muslims "a very real threat to the internal security of the Nation," [12] and the use of wiretapping indicates that his conclusion was taken seriously by the Attorney General.[13] *Cf. Wallace* v. *Brewer, supra,* 315 F. Supp. at 441, 440-50.

In such a context, it is little wonder that the Justice Department, which was at the same time treating the Muslims as political terrorists, would conclude that the Nation of Islam was not a religion, or that the appeal board would rely upon that conclusion to deny petitioner a conscientious objector exemption. In *United States* v. *Ballard,* 322 U. S. 78, 87 (1944), Justice Douglas remarked:

> "If one could be sent to jail because a jury in a hostile environment found those [religious] teachings to be false, little indeed would be left of religious freedom"

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[10] *See* Testimony of J. Edgar Hoover at the *Hearings on Appropriations for the Judiciary and Related Agencies, Department of Justice, Before the Subcom. on Departments of State, Justice and Commerce,* 89th Cong., 1st Sess. at 320 (1965); *Id.* 2d Sess. at 256 (1966); *Id.* 90th Cong. 1st Sess. at 622 (1967); *Id.* 2d Sess. at 543 (1968); *Id.* 91st Cong. 1st Sess. at 542 (1969).

[11] Three out of the four logs of illegal surveillances that were disclosed to petitioner in the course of the remand proceedings in this case resulted from wiretaps on the phones of Elijah Muhammad in Phoenix, Arizona and Chicago, Illinois (A. 238a- 239a).

[12] See *Hearings, supra* note 10, 90th Cong. 1st Sess. at 622 (1967).

[13] Prior to the enactment of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §2510 *et seq.*) wiretapping could only be undertaken by federal officers with the express authorization of the Attorney General in cases where national security was at stake (See Memoranda of Presidents Roosevelt, Truman and Johnson (R.P. Vol. I 16-21)).

But that is just what happened to petitioner when the Department of Justice denied the validity of his religious beliefs, the Selective Service System rejected his conscientious objector claim, and the courts below found him guilty.

The First Amendment means at the very least that Government cannot, because of a dislike of religious doctrines, deny to the followers of one religion what it accords to adherents of others. However abhorrent are the beliefs of the Black Muslims to the Department of Justice—however "political and racial" it considers the sources of their doctrines—the Nation of Islam nevertheless constitutes a religion within the contemplation of the Act and its members are entitled to the benefits of the conscientious objector exemption. There was no basis in fact, therefore, for denial of petitioner's claim on the ground that his opposition to participation in war was not based on "religious training and belief."

B. The Department of Justice's Conclusion That Petitioner Was Not Opposed To Participation in War in Any Form is in Conflict With This Court's Decision in *Sicurella* v. *United States*, is Based Upon a Constitutionally Impermissible Interpretation of Religious Doctrine, and Improperly Relies Upon Petitioner's Objection to the Vietnam War.

With respect to the substance of petitioner's objections to war, the Justice Department concluded that he did not satisfy the requirements of §6(j) because he was only opposed to participation in certain types of war in certain circumstances rather than to war in any form (A. 122a-123a). This determination was based entirely upon three considerations: the fact that, in the Department's view, petitioner had admitted that there were some wars in which

he would participate; the Department's view that the teachings of the Nation of Islam only precluded participation in war on behalf of the United States; and the fact that petitioner had expressed the opinion that he could not participate in the Vietnam war. As we point out below, none of these considerations can support the conclusion that petitioner was not opposed "to participation in war in any form." On the contrary, the record convincingly establishes that petitioner's convictions with respect to war satisfied the statutory test.

1. *Petitioner's Objections to Participation in War.*

We start with the premise that it is the convictions of the registrant and not the doctrines of his religion that must be the central concern of the Selective Service System. *United States* v. *Seeger*, 380 U. S. 163, 184-185 (1965). Thus, affiliation with a particular religious sect, even though it may be pacifist, does not automatically entitle one to conscientious objector status, *United States* v. *Simmons*, 213 F.2d 901 (7th Cir. 1954), *rev'd on other grounds*, 348 U. S. 453 (1955), nor does the fact that a registrant's religion does not proscribe participation in war disqualify him for the exemption. *United States* v. *St. Clair*, 293 F. Supp. 33 (E.D. N.Y. 1968). It is, of course, unnecessary that the conscientious objection arise from church membership at all. *United States* v. *Owen*, 415 F.2d 383 (8th Cir. 1969). As this Court has recently held, it is enough that because of beliefs which "function as a religion in his life," a registrant is opposed to participation in all wars. *Welsh* v. *United States*, 398 U. S. 333, 339 (1970).

The record in this case clearly establishes that petitioner was opposed, because of his interpretation of the doctrines of his religion, to participation in all war with the excep-

tion of a theocratic war or a war in which he was directed to fight by Allah.

At the special hearing before Judge Grauman, petitioner discussed his opposition to war in considerable detail. He stated that:

> "the Holy Qur'an do teach us that we do not take part of—in any part of war unless declared by Allah himself, or unless it's an Islamic World War, or a Holy War, and . . . we are not to even as much as aid the infidels or the nonbelievers in Islam, even to as much as handing them a cup of water during battle" (A. 68a).

Later he explained his understanding of what he had described as the "Islamic World War," the "Holy War" or the "War of Armageddon:"

> "We are only preparing for the war of Armageddon divinely. We talk that the battle will be between good and right, truth and falsehood, and we are taught that the battle will be between God and the Devil and so therefore, we hope and pray that we are still with the Honorable Elijah Muhammad, for when that hour and day come that we can be told what side to go to. We are trying to be prepared where we can go on the right side. . . . and we just hope that we are spiritually and physically and internally and mentally and morally able to get on the side of Allah and the Honorable Elijah Muhammad when Armegeddon start . . . for we are only preparing for Allah in spirit . . . in a spiritual way" (A. 106a).

Even in the holy war, which petitioner believed would be a physical conflict between the forces of good and evil (A. 107a), he did not believe that he or his fellow Muslims would actually participate.

Indeed, in the course of the hearing petitioner stated that he would not fight in a war unless:

> "the Honorable Elijah Muhammad looked me in the face and he who I believe is directly from Allah, Almighty God Allah, and if he looked at me and advised me, which I'm sure he wouldn't do, to fight in any kind of war, if he advised me to I would" (A. 101a).

When further pressed on the hypothetical question as to whether he would fight if Elijah Muhammad told him to, petitioner made it clear that he thought any such command was inconceivable. He said:

> "I can speak for him [Elijah Muhammad] right here and now, that I know he would not say anything like that if he is truly following the Holy Qur'an and what he teaches us that God taught him . . . I don't believe that, and I would actually say that I could guarantee you my life that he won't advise me to do something like that . . ." (A. 101a-102a).

Otherwise, petitioner believed in the use of force only for self-defense. He explained:

> "[B]y our teaching and by we believing in God, whose law is self-preservation, we are taught not to be the aggressor, but defend ourselves if attacked and a man cannot defend himself if he knows not how. . . . So, we, the Muslims to keep in physical condition, we do learn how to defend ourselves if we are attacked since we are attacked daily through the streets of America and have been attacked without justification for the past four hundred years" (A. 104a-105a).

Finally, petitioner considered boxing a sport and himself a scientific boxer who was not "violent" in the ring:

> "I never get violent. I never lose my head and I'm known for being a calm, cool boxer and I never feel as

though I'm violent and I never fight and act like I'm violent" (A. 98a).

Petitioner's testimony at the special hearing was perfectly consistent with every statement he had previously made in connection with his conscientious objector claim from the time he first asserted it on February 14, 1966. In his letters of February 14th and March 28th, in his special conscientious objector form (SSS Form No. 150), and at his personal appearance before the local board he maintained that he was opposed to taking any part in earthly wars and to killing human beings (A. 10a, 13a, 18a, 21a). Literally everyone who testified on behalf of petitioner at the special hearing or who was interviewed by the FBI, moreover, was of the opinion that petitioner was opposed to participation in any military service whatsoever (*E.g.* A. 27a, 32a, 54a, 56a, 133a, 134a, 135a, 136a, 137a, 139a).

In the face of his consistent and unequivocal opposition to participation in all wars, the Department of Justice could find only one remark made by petitioner in the entire record to support its conclusion that there are real wars in which petitioner would participate. At one point, petitioner explained that the Holy Qur'an and Elijah Muhammad taught Muslims:

> "that we are not to participate in wars on the side of nobody who—on the side of nonbelievers, and this is a Christian country. . . . So we are not, according to the Holy Qur'an, even as much as aid in passing a cup of water to the—even a wounded" (A. 96a-97a).

Presumably, on the basis of the negative implication of the statement that Muslims were taught not to participate in wars on the side of nonbelievers, the Department concluded that petitioner was willing to fight in wars on behalf

of Muslims. But even assuming that this is a fair reading of petitioner's statement, it is perfectly clear in light of the rest of his testimony that the only war he would ever participate in, even on the side of Muslims, was a Holy War or a war in which he was directed to fight by Allah. Indeed, this fragmentary statement upon which the Department places so much reliance is perfectly consistent with petitioner's previous statement that "the Holy Qur'an do teach us that we do not take part . . . of war unless declared by Allah himself, or unless its an Islamic World War, or a Holy War, and . . . we are not to even as much as aid the infidels or the nonbelievers in Islam, even to as much as handing them a cup of water during battle" (A. 68a). Thus, at the only time that Muslims could ever participate in war, the war of Armageddon, petitioner would take part on the side of Islam; but at all other times he would not give the slightest amount of aid to anybody engaged in war.

In *Sicurella* v. *United States*, 348 U. S. 385 (1955), this Court held that this kind of theocratic conflict was not "war" within the meaning of § 6(j) and that a registrant's willingness to participate in it did not disqualify him for a conscientious objector exemption. In words equally appropriate to this case, the Court said:

> "Granting that these articles picture Jehovah's witnesses as anti-pacifists, extolling the ancient wars of the Isrealites and ready to engage in a 'theocratic war' if Jehovah so commands them, and granting that the Jehovah's Witnesses will fight at Armageddon, we do not feel this is enough. The test is not whether the registrant is opposed to all war, but whether the registrant is opposed on religious grounds, to participation in war. As to theocratic war, petitioner's willingness to fight on the orders of Jehovah is tempered by the fact that, so far as we know, their history records no

such command since Biblical times and their theology does not seem to contemplate one in the future. And although the Jehovah's Witnesses may fight in the Armageddon, * * * [we] believe that Congress had in mind real shooting wars. . . . We believe the reasoning of the Government . . . is so far removed from any possible congressional intent that it is erroneous as a matter of law" (348 U.S. at 390-91).

Petitioner's views on war, based upon his understanding of the doctrines of the Nation of Islam, are indistinguishable in any material respect from those of the Jehovah's Witness in *Sicurella*. He was opposed to all except theocratic war, he would fight only in self-defense, he did not believe in carrying weapons and there was no possibility in his mind that he would ever be commanded to engage in war by his God. Consequently, there was nothing in petitioner's beliefs that could provide a basis in fact for the denial of his claim. To the extent that the Justice Department relied on them, its recommendation is erroneous as a matter of law.

2. *The Teachings of the Nation of Islam.*

In its advice letter the Department took the position that the doctrines of the Nation of Islam precluded only participation in war on behalf of the United States, but allowed participation in earthly wars on behalf of other, presumably Muslim, nations. But as we have pointed out above,[14] it is only petitioner's views on war, not those of his religion, that are relevant to his conscientious objector claim. Thus, even if the Department's interpretation of the Muslim doctrines concerning participation in war

[14] *See* p. 23, *supra*.

was a reasonable one it could not legitimately provide a basis for rejecting petitioner's claim in the face of *his interpretation* that those doctrines precluded him from participating in any earthly war. *See United States* v. *Seeger*, 380 U. S. 165, 184 (1965); *Welsh* v. *United States*, 398 U. S. 333 (1970). Even if on the basis of some theological absolute petitioner misinterpreted the doctrines of the Nation of Islam, he is nevertheless entitled to the exemption because, as the hearing officer found and the record overwhelmingly supports, *he* was opposed to participation in all earthly wars by reason of what *he* believed to be the dictates of his religion.

But even assuming that the doctrines of the Nation of Islam are considered relevant in the abstract to petitioner's conscientious objector claim, the record in this case demonstrates that these doctrines support and are completely consistent with the beliefs petitioner expressed. The contrary conclusion by the Department of Justice not only finds no support in the record, but is based on the kind of interpretation and analysis of the meaning and significance of Muslim religious doctrines that is forbidden by the First Amendment.

In determining whether the doctrines of a particular religion preclude participation in all war within the meaning of § 6(j) of the Act, the Government must be limited to a literal reading of the tenets of the faith. It must take at face value what is stated in the accepted sources of the religion or by the accepted religious spokesmen; it may not supply its own interpretation of the religion or any of its doctrines. *See United States* v. *Ballard*, 322 U. S. 78 (1944). For as this Court has held, the First Amendment forbids courts or other secular authorities from playing any role in determining the "interpretation of particular church doctrines and the importance of those doctrines to

the religion." *Presbyterian Church* v. *Mary Elizabeth Blue Hull Church*, 393 U. S. 440 (1965). This is so because:

> "If civil courts undertake to resolve such controversies [over religious doctrine] . . . the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern" (393 U. S. at 449).

The Justice Department and the Selective Service System, therefore, can no more make petitioner's entitlement to a conscientious objector exemption turn upon their interpretation of certain doctrines of the Nation of Islam, than could the Georgia courts award church property on the basis of the interpretation and significance that they assigned to aspects of church doctrine.

The "neutral principle" which must govern the Government's determination of whether or not the doctrines of a particular religion preclude participation in all war, to the extent such an inquiry is relevant, is that Government inquiry must stop at a literal reading of accepted religious sources. In short, it may not interpret or analyze the doctrines of the religion.

Such a reading of the sources in this record is completely in accord with petitioner's own understanding of the meaning of Muslim doctrines concerning participation in war. Elijah Muhammad explained the meaning of Islam in his *Message to the Blackman in America* (1965) (Ex. D to Special Hearing, A. 41a) in this way:

> "The author of Islam is Allah (God). We just cannot imagine God being the author of any other religion but one of peace. Since peace is the very nature of Allah (God), and peace He seeks for his people and peace is the nature of the righteous, most surely Islam is the religion of peace (p. 68).

* * *

> "The very dominant idea in Islam is the making of peace and not war; our refusing to go armed is our proof that we want peace" (p. 322).

Muslims are, therefore, forbidden to carry weapons or to participate in any war and one of the central dogmas of their faith states:

> "We believe that we who declared ourselves to be righteous Muslims should not participate in wars which take the lives of humans" (*Id.* at 164).

The only use of force that is consistent with the Muslim faith is self-defense, which Elijah Muhammad believes is justified by God and by Divine Law (*Id.* at 217). But even then, Muslims may not use weapons; if they are attacked by armed persons they must rely upon Allah to protect them (*Id.* at 319).[15]

Although Muslim doctrine condemns war among nations and men, an ultimate theocratic war has an important place in the religion. This war is foreseen as one directed by Allah which will destroy the enemies of the black people. After this destruction, which is variously described as a series of natural disasters, the falling of bombs from a wheel-shaped plane in the sky or an ultimate war among nations, black people will live in peace under the guidance of Allah (*Id.* at 270, 291-92).

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[15] The Black Muslim doctrines concerning war can be clearly traced, moreover, to the Holy Qur'an, translated by Maulana Muhammad Ali, which was submitted by petitioner as Exhibit C at the Special Hearing (A. 41a). This version of the Qur'an views war as an evil that can only be justified when it is necessary to defend Muslims against religious persecution. See Maulana Muhammad Ali, *Translation of the Holy Qur'an* 2:190, 2:191, 2:216, 2:217 and commentary at pp. 80-81, notes 238, 239, pp. 90-91, note 277 (5th ed. 1963).

In support of its interpretation that the doctrines of the Nation of Islam only preclude participation in war on behalf of the United States, the Department relies almost entirely upon the article of the Muslim faith that states:

> "We believe that we who declare ourselves to be righteous Muslims, should not participate in wars which take the lives of humans. We do not believe this nation should force us to take part in such wars, for we have nothing to gain from it unless America agrees to give us the necessary territory wherein we may have something to fight for" (A. 120a).

The only thing that is clear about this statement is its absolute opposition to participation in wars which take human lives. The rest of the passage is ambiguous; it can be read simply as a statement of the fact that Muslims do not benefit from wars fought by the United States because they have no stake in the country; it can be read as suggesting that if the Muslims were given some territory there might be some circumstances under which they would fight; or it can be read as saying that Muslims would even fight on behalf of the United States if they were given some territory.

But even if it is read as suggesting the possibility of a future willingness of Muslims to fight under some circumstances, there is no indication that even under such circumstances they would participate in a war that was inconsistent with the teachings of their faith or that would be considered "war" within the meaning of §6(j). Thus, fighting without weapons in self-defense, in defense of friends and co-religionists, or in defense of community would neither violate their religious scruples nor disqualify them from the exemption. *See United States* v. *Owen*, 415 F.2d 383, 390 (8th Cir. 1969); *United States* v. *Haughton*,

413 F.2d 736, 742 (9th Cir. 1969); *United States* v. *Purvis*, 403 F.2d 555, 563 (2d Cir. 1968); *Taffs* v. *United States*, 208 F. 2d 329, 331 (8th Cir. 1953), *cert. denied*, 347 U. S. 928 (1954); *Shepherd* v. *United States*, 217 F.2d 942, 944 (9th Cir. 1954). Moreover, the inference that Muslims might fight at some time if they were given territory is even more speculative than the statement of the registrant in the *Owen* case that it was possible that he might change his mind about participating in war if his country were invaded (415 F.2d at 390). Here, as in *Owen*, the statement relates to a contingency and cannot supply a basis in fact for denial of a conscientious objector exemption (*Ibid*). And the possibility of the Muslims fighting for territory that the United States has given them is at least as unlikely an eventuality as the theocratic war that this Court considered too far removed from Congressional intent to be considered "war" within the meaning of the Act in *Sicurella* v. *United States*, 348 U. S. 385 (1955).

The only other basis for the Justice Department's conclusion that petitioner only objected to participating in war on behalf of the United States are the statements attributed by the FBI resumé to Elijah Muhammad and two co-religionists that the teachings of the Nation of Islam precluded petitioner "from participating in any form in the military service of the United States" (A. 120a). But it is sheer sophistry to argue that this statement (which is clearly correct) implies that the teachings of the Nation of Islam do not preclude Muslims from fighting for some other nation. Moreover, it is patently absurd to attribute such doctrinal significance to the wording of a summary of FBI reports which were based on field interviews by agents (R.P. vol. III 252-53). Indeed, the Justice Department was being less than candid when it gave such weight to this particular phrase while at the

same time it ignored statements in the same context that were inconsistent with its conclusion. Thus, Elijah Muhammad is reported in the same paragraph of the resumé to have said that petitioner had been advised "that no member of the Nation of Islam may bear arms against *anyone*" (A. 149a), and that he believed that petitioner was sincere "in his objection to *any* form of military service" (A. 148a) (Emphasis added). Similarly, the Department overlooked the statements by co-religionists that petitioner would not "violate the tenets of this teachings [Nation of Islam] by engaging in military service" (A. 150a); that because of his practice of the teachings of Elijah Muhammad, petitioner is "completely sincere in his claim of conscientious objector to military service" (A. 152a-153a); and "that war, killing and violence are wrong and in direct contradiction to these teachings" (A. 153a).

It is apparent that none of the specific references to Muslim doctrine or writings can support the Department's conclusion that they precluded only participation in wars on behalf of the United States. Rather, the Department based its conclusion upon its view that the Muslims' opposition to participation in war was primarily motivated by their hostility toward the United States government. Thus, the Department interpreted the writings of Elijah Muhammad to express the "essential" views of the Black Muslims that "the white man is their enemy, and that the black man should disassociate himself from the United States Government and its institutions and secure an independent nation for the black man within the United States" (A. 120a-121a). The Department then interprets the Muslim doctrines opposing participation in all war in light of this supposed fundamental opposition to the United States and concludes that the teachings of the

Nation of Islam only preclude fighting on behalf of the United States "because of political and racial objections to policies of the United States as interpreted by Elijah Muhammad" (A. 121a).

This conclusion, therefore, is based on an interpretation of the tenets of the Muslim faith which conflicts not only with the interpretation of those teachings by petitioner and every other Muslim who testified or was interviewed by the FBI, but also with a literal reading of the Muslim doctrines themselves. As we have pointed out, such an intrusion by Government into purely religious affairs violates the First Amendment, *Presbyterian Church* v. *Mary Elizabeth Blue Hull Church, supra; United States* v. *Ballard,* 322 U. S. 78 (1944).

The treatment of petitioner by the Department of Justice provides a convincing example of the evil that the First Amendment's proscription against the interpretation of religious doctrine by Government is intended to guard against. For when secular authorities undertake to make serious liabilities turn upon the content of religious beliefs, the danger is great that their own moral, ethical and political standards will influence their interpretation of those beliefs. *United States* v. *Ballard,* 322 U. S. 78 (1944); *see Founding Church of Scientology* v. *United States,* 409 F.2d 1146 (D.C. Cir. 1969); *cf. United States* v. *Kuch,* 288 F. Supp. 439 (D.D.C. 1969). What emerges from the record in this case is the feeling, indeed the conviction, that the Government's interpretation of Muslim doctrine was shaped not by what Muslim doctrines said about participation in war, but by its preconceived notion of what kind of an organization the Muslims were. As we have already pointed out, the Department of Justice evidently *believed* that the Muslims were a subversive, military-like organization that was a threat to

national security.[16] And it is probable that the Department even thought that the Muslims might seek to accomplish their goal of a separate black state through violence or insurrection at the command of Elijah Muhammad. This belief is clearly manifested in the opinion letter by its concern with the ambiguous passage about the possibility of Muslims fighting if they had territory and with petitioner's statement that he would fight if commanded to by Elijah Muhammad (A. 120a-121a).

Thus, although any such suspicions have never been substantiated—and have been thoroughly discredited by most observers[17]—it is plain that the Department started its consideration of petitioner's claim with this notion in mind and set about proving it from the record. In short, for the same reasons that led the Department to consider the Muslims a threat to national security, it simply chose to disbelieve the truth of their religious scruples against participating in all wars. But in so doing, the Government entered upon a domain that is forbidden by the First Amendment, and its determination cannot support the denial of petitioner's conscientious objector claim.

3. *The Vietnam War.*

We need not dwell long on the Justice Department's recommendation that petitioner's conscientious objector claim should be denied because his opposition to war was based in part upon objections to the Vietnam War (A. 124a).

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[16] See pp. 20-21, *supra* and note 13.

[17] *See* Lincoln, at 205 (1961); E. U. Essien-Udom, *Black Nationalism*, 308, 311-323, 351-365 (1969); E. Litt, *Ethnic Politics in America*, 89-91 (1970); B. E. Garnett, "Invaders from the Black Nation: The Black Muslims in 1970", p. 25 (Special Report, Race Relations Information Center, Nashville, Tenn., 1970).

This conclusion was based chiefly upon a newspaper article which reported petitioner as saying:

> "I am a member of the Muslims and we don't go to no war unless they are declared by Ali [sic] himself. I don't have no personal quarrel with those Vietcongs.
>
> * * *
>
> "Let me tell you, we Muslims are taught to defend ourselves when we are attacked: Those Vietcongs are not attacking me" (A. 123a).

In addition, at the time of his appearance before his local board, petitioner is reported to have said that he "objected to being in service because he has no quarrel with the Viet Cong" and "that he could not, without being a hypocrit, take part in anything such as war" (A. 18a).

In context, however, both of these statement constitute affirmations of his opposition to participation in all wars and his willingness to fight only in self-defense. In the first statement, he correctly explains that since Muslims are permitted only to fight in self-defense he cannot fight the Vietcong who are not attacking him. And the second statement probably reflects a similar explanation, as recorded by the clerk of the local board. In neither case is there any indication that he objected only to the Vietnam war, or even that his objections to the Vietnam war were grounded upon political or philosophical considerations. *Cf. Gillette* v. *United States,* No. 85, O. T. 1970; *Negre* v. *Larsen,* No. 325, O. T. 1970.

However, as many courts have now recognized, a registrant's opposition to the Vietnam war, is consistent rather than inconsistent with a conscientious opposition to participation in all war, and cannot provide a basis for the denial of a conscientious objector claim. *United States* v. *Cum-*

mins, 425 F.2d 646, 650 (8th Cir. 1970); *United States* v. *Pence*, 410 F.2d 557, 562-63 (8th Cir. 1969); *United States* v. *Haughton*, 413 F.2d 736, 742 (9th Cir. 1969); *Bates* v. *Commander, First Coast Guard District*, 413 F.2d 475, 479 (1st Cir. 1969); *Kessler* v. *United States*, 406 F.2d 151, 155 (5th Cir. 1969); *United States* v. *Prince*, 310 F. Supp. 1161, 1165 (D. Me. 1970); *United States* v. *St. Clair*, 293 F. Supp. 337, 344 (E.D. N.Y. 1968). As the court in *Bates* said:

> "The fact that petitioner wrote letters prior to submitting his application expressing political opposition to the war does not disqualify him from being a conscientious objector. See Fleming v. United States, 344 F.2d 912 (10th Cir. 1965). The fact that he may abhor the Vietnam war and regard it as 'warfare's most horrible manifestation at this time' does not detract from his religious belief which is amply documented. To hold otherwise would require a finding that religious belief cannot co-exist with political opinion. The statement of such a proposition contains its own refutation" (413 F.2d at 478).

Even if petitioner's statements are read as expressing a particular objection to the Vietnam war, therefore, they cannot, as a matter of law, supply a basis in fact for the denial of his conscientious objector claim in light of his amply documented opposition on religious grounds to participation in all war.

C. The Department of Justice Erred in Concluding that Petitioner Had Failed to Sustain the Burden of Establishing the Sincerity of His Claim by Virtue of the Lateness of its Assertion and the Fact that He Asserted Other Consistent Claims For Exemptions at the Same Time.

A third basis for the Justice Department's recommendation to the appeal board that petitioner's conscientious objector claim be rejected was its conclusion that petitioner had not sustained his burden of establishing the sincerity of his claim (A. 127a). The Department attributes his failure to prove his claim chiefly to the fact that petitioner did not assert it until February, 1966, after he had been a conscientious objector for at least two years. In what must have sounded to the lay appeal board like the citation of a rule of law that absolutely precluded petitioner from being clasified as a conscientious objector, the Department concluded:

> "[A] registrant has not shown overt manifestations sufficient to establish his subjective belief where, as here, his conscientious-objector claim was not asserted until military service became imminent. *Campbell* v. *United States*, 221 F.2d 454; *United States* v. *Corliss*, 280 F.2d 808, *cert. denied*, 364 U.S. 884" (A. 127a).

Of course, the correct legal standard is not, as the Justice Department certainly implied, that a registrant who does not assert a conscientious objector claim until military service is imminent can never show "overt manifestations sufficient to establish his subjective belief." Rather, the correct rule is simply that tardiness in the presentation of a conscientious objector claim *may* in some circumstances provide the basis for an inference of insincerity. *United States* v. *Bornemann*, 424 F.2d 1343 (2d Cir. 1970);

United States v. *Broyles*, 423 F.2d 1299 (4th Cir. 1970) (*en banc*); *see Witmer* v. *United States*, 348 U.S. 375 (1955). The assertion of such an erroneous standard upon which the appeal board might naturally rely was clearly prejudicial to petitioner in that it may have aborted the board's consideration of the great deal of other evidence bearing on the issue of petitioner's sincerity. For that reason alone, reversal is warranted. *See United States* v. *Bornemann, supra; United States* v. *Gearey*, 368 F.2d 144 (2d Cir. 1966), *cert. denied*, 389 U.S. 959 (1967).[18]

But this Court need not rely on such a narrow ground. On the facts of this case, it was error for the Department of Justice to even maintain that the failure of petitioner to present his conscientious objector claim prior to February, 1966, was an objective factor that the appeal board could consider as tending to show insincerity.

Petitioner first asserted his conscientious claim in his letter to his local board dated February 14, 1966 (A. 9a). This letter was written several days after petitioner had received the statement of his acceptability for induction and not, as the Justice Department and the court below asserted, after he had been already classified 1-A. He was classified 1-A three days after he wrote the letter, and one day before his local board sent him the special conscientious objector form (A. 4a).

Petitioner's conscientious objections to participation in war crystallized in January, 1964, at about the same time

[18] The court in *United States* v. *Englander*, 271 F. Supp. 182 (S.D.N.Y. 1967) criticized even the citation of legal authority in a similar context because "it could well have a tendency to suggest that a particularized factual judgment has somehow the status of generally applicable 'law'." (271 F. Supp. at 184, n. 2). The Government is even more likely to mislead the appeal board where, as in the present case, the particularized factual judgment is stated as if it were a rule of law.

that he formally became a member of the Nation of Islam and that he was first called for his pre-induction physical examination (A. 85a-86a). When he had first registered for the draft he knew nothing of Islam "and if you had drafted me that day I would have went" (A. 89a). Although not long thereafter, probably sometime in 1961, petitioner became a follower of Elijah Muhammad and accepted the teachings of Islam, he did not have to confront the decision of whether he was a conscientious objector because "I had nothing to worry about and I had nothing about war on my mind" (A. 86a). Indeed, he candidly admitted that:

> "at that moment . . . I'd probably accepted [military service] because my beliefs and my sincerity and my knowledge wasn't strong enough to give me the courage to say, and, the inspiration to say, 'Well, I'll die before I do this' " (A. 86a).[19]

The crux of the issue, then, is whether a lack of sincerity can be inferred from the fact that petitioner did not assert his claim for a conscientious objector exemption at any time between the time it arose in January, 1964 until after he was found to be acceptable for induction in February, 1966. Obviously, the hearing examiner considered this issue important because he questioned petitioner about it closely (A. 85a-95a). And in concluding that petitioner was sincere in his claim he placed great weight on the

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[19] Although petitioner stated that he was a conscientious objector at heart from as early as 1961, in light of all his testimony it seems clear that he never really faced the question squarely or had to make a decision about it until January 1964. He testified:

> "Well, I would say truthfully, the onliest time that I really thought about it—the onliest time that I was conscientious that I would have to make a decision was the first time that they mentioned going to take a physical my first—the first time I had to go get tested" (A. 86a).

statements of two of petitioner's business associates, one of whom was known to him personally and the other by his outstanding reputation. Both associates corroborated completely petitioner's testimony that his conscientious objections to war had arisen early in 1964, and they explained that they had persuaded petitioner not to seek the exemption at that time for fear that the stigma of his affiliation with the Muslims would cause substantial financial losses. Instead, they convinced him to take all of the required steps prior to induction in the hope that it might not be necessary to claim the exemption and ruin his career (A. 131a, 133a-134a). *Cf. United States* v. *Broyles, supra,* 423 F.2d at 1303.

As it turned out, petitioner was not forced to make the decision to file his claim. When he was found not acceptable for induction first in January and again in March, 1964 and was classified 1-Y, he felt that it was unnecessary to seek exemption from service. He explained that:

> "I have no need the first two times that I was called up to, because they never accepted me, but I'm sure that if they had I—as a matter of fact, Allah is my witness here that if they had called me when I was in Miami and I had passed the test then I would have had to do—just say I'm a conscientious objector . . ." (A. 95a).

Similarly, petitioner's business associate was "convinced that [petitioner] would have filed his conscientious-objector claim at that time if he had not failed to pass his Armed Forces physical examination" (A. 131a). Petitioner remained unacceptable for induction from January, 1964 until February 3, 1966, and he notified the board of his conscientious objector claim almost immediately after he received notice of the determination of his acceptability (A. 11a).

Petitioner was, therefore, unacceptable for induction and classified 1-Y virtually from the time his conscientious objections to participation in war crystallized in January, 1964 until he did assert his claim in February, 1966. Since 1-Y is a lower classification than the 1-O classification for conscientious objectors (32 C.F.R. §1623.2), petitioner was not required by the applicable regulation (32 C.F.R. §1625.1 (b)) to present his conscientious objector claim to his local board until after he was classified 1-A. *United States* v. *Bornemann, supra,* 424 F.2d at 1347; *United States* v. *Rutherford,* —— F.2d —— (8th Cir. No. 20,137, Feb. 3, 1971). But, as we have seen, petitioner presented his claim as soon as it became apparent that he would be reclassified. Thus, petitioner is in precisely the same situation as the registrant in *Bornemann,* where the court held:

> "We are thus of the view that Bornemann brought his conscientious objections to the attention of his board as soon as 32 C.F.R. § 1625.1(b) required him to do so. In our view it would be improper to penalize him for failure to act with greater dispatch than the regulations demanded. We conclude, therefore, when the Department of Justice maintained that Bornemann's failure to present his claims prior to August 1966 was an objective factor that the Appeal Board could consider as tending to show insincerity, it erred" (424 F.2d at 1348).

The Department's identical conclusion with respect to petitioner was, therefore, similarly in error.

In any event, in light of the undisputed explanation as to why petitioner did not assert his claim when it first arose, there can be no inference of insincerity. Where there is such a *prima facie* adequate explanation of lateness, only

a disbelief in the credibility of the registrant can support a denial of his claim. *United States* v. *Broyles, supra,* 423 F.2d at 1303. Since petitioner's testimony was accepted by the hearing officer and was corroborated in every detail by the other witnesses at the special hearing as well as by the FBI investigation, there is no basis for questioning his credibility.

The only other factor to which the Justice Department refers as tending to discredit petitioner's sincerity is the evidence that petitioner sought other exemptions at the same time as he sought a conscientious objector exemption. The advice letter suggests that he was insincere because:

> "the record of his efforts to have the local board reconsider his classification indicates that the registrant's primary concern was not his conscientious-objector claim, but the financial hardship which would result from his induction into the Armed Forces" (A. 124a).

But we fail to see how the simultaneous assertion by a registrant of consistent claims for exemption on various grounds, including medical, hardship and conscientious objection, can support an inference of his insincerity. Not only do Selective Service regulations place upon the registrant the duty to provide his local board with information which would result in his being placed in the *lowest* class (32 C.R.R. §§ 1623.2, 1625.1(b)); but he has the statutory right to apply for any exemption for which he qualifies. *See United States* v. *Cummins,* 425 F.2d 646, 650 (8th Cir. 1970); *Capobianco* v. *Laird,* 424 F.2d 1304, 1306 (2d Cir. 1970); *United States* v. *Owen,* 415 F.2d 383, 390 (8th Cir. 1969); *United States* v. *Peebles,* 220 F.2d 114, 118 (7th Cir. 1955); *Taffs* v. *United States,* 208 F.2d 329, 331 (8th Cir. 1953), *cert. denied,* 347 U. S. 928 (1954).

As the court in *Owen* noted:

> "[T]he fact that Owen sought other classifications after being denied a 1-O classification is in no way inconsistent with his claimed conscientious objection. . . . Neither do we feel that registrants claiming conscientious objection may apply for other unrelated classifications only at their peril. To so hold would chill the right Congress sought to protect in enacting § 6(j) and would undermine the principles of individual conscience" (415 F.2d at 390).

A conscientious objector claim may be denied only when there are some objective facts in the record that cast doubt on the sincerity of the claim. *Witmer* v. *United States*, 348 U. S. 375 (1955). Suspicion or speculation cannot suffice, and disbelief must have an honest and rational foundation. *United States* v. *Hesse*, 417 F.2d 141, 144 (8th Cir. 1969); *United States* v. *Corliss*, 280 F.2d 808, 814 (2d Cir. 1960) *cert. denied*, 364 U. S. 884 (1960). On the record of this case, it is apparent that there is no such basis for the disbelief of petitioner's claim. Apart from the lateness of its assertion, which was more than adequately explained, all of the evidence conclusively established his sincerity.

II.

Petitioner's Conviction Must Be Reversed If The Department of Justice's Advice Was Erroneous With Respect to Any One of the Grounds Upon Which It Recommended That Petitioner Be Denied a Conscientious Objector Exemption.

We have argued above that the Department of Justice's advice was erroneous with respect to each of the several grounds upon which it recommended that petitioner's conscientious objector claim be denied and that there was no basis in fact in the record for denial of the claim by the appeal board. However, if the Department's advice was erroneous in *any* material respect, petitioner's conviction must be reversed. This is true even though the appeal board might have legitimately denied the claim upon some other ground.

As this Court held in *Sicurella* v. *United States*, 348 U. S. 385 (1955), where the Department of Justice had erroneously recommended that a registrant be denied an exemption on the ground that he was not opposed to theocratic war:

> "... we feel that this error of law by the Department, to which the Appeal Board might naturally look for guidance on such questions, must vitiate the entire proceedings at least where it is not clear that the Board relied on some legitimate ground. Here, where it is impossible to determine on exactly which grounds the Appeal Board decided the integrity of the Selective Service System demands at least that the Government not recommend illegal grounds" (348 U. S. at 392).

In the present case, petitioner clearly made out a *prima facie* case for his entitlement to a conscientious objector exemption with respect to each of the statutory criteria: the religious basis of the claim, his conscientious opposition to participation in all war; and his sincerity. On the face of the record there is no legitimate ground upon which it is obvious that the appeal board could have properly rejected petitioner's claim. And since the appeal board gave no reasons for its action, there is no way of knowing whether it rejected petitioner's claim on the ground that it was not religious, that he was not opposed to all war, or that he lacked sincerity.

Thus, if the Department of Justice's advice was erroneous upon any one of these grounds upon which the appeal board *may* have relied, the conviction must be reversed even if a court can find a basis in fact to support a denial on one of the other grounds. In *Kretchet* v. *United States*, 284 F.2d 561 (9th Cir. 1960), for example, the court said:

> "We are unable to determine from the record whether the board in refusing appellant's claim for exemption, did so because of appellant's lack of sincerity or because it believed that appellant's conscientious objections were not based upon religious training and belief, or because appellant was not opposed to war in any form, or whether such action was based upon all three grounds or on any two of them. The advice given by the Department of Justice to the appeal board that it could refuse to sustain appellant's claim for exemption on the ground that he was not opposed to war in any form, in our view, was clearly erroneous and fatally infected the adverse recommendation of the Department of Justice" (284 F.2d at 565).

This rule that a registrant's conviction must be reversed where the board may have relied upon an erroneous recommendation by the Department of Justice in denying his conscientious objector claim has been widely followed. *United States* v. *Jakobson,* 325 F.2d 409 (2d Cir. 1963) *aff'd sub nom. United States* v. *Seeger,* 380 U. S. 163 (1965); *United States* v. *Washington,* 392 F.2d 37 (6th Cir. 1968); *United States* v. *Haughton,* 413 F.2d 737 (9th Cir. 1969); *Ypparila* v. *United States,* 219 F.2d 465 (10th Cir. 1954); *United States* v. *St. Clair,* 293 F.2d 337 (E.D. N.Y. 1968). Indeed, it is now the law in many circuits that where a registrant makes out a *prima facie* case for the exemption his conviction must be reversed where the record does not disclose any reason for the denial of his claim. *Scott* v. *Commanding Officer,* 431 F.2d 1132 (3rd Cir. 1970); *United States* v. *Broyles,* 423 F.2d 1299 (4th Cir. 1970) (*en banc*); *United States* v. *Lemmens,* 430 F.2d 619 (7th Cir. 1970); *United States* v. *Abbot,* 425 F.2d 910 (8th Cir. 1970).

The rationale of these cases is, of course, the avoidance of blind endorsement by courts of erroneous draft board decisions. *United States* v. *Broyles, supra,* 423 F.2d at 1304. Courts will not indulge in the speculation that the boards have acted on proper grounds when no reasons are stated, or that erroneous advice by the Department of Justice did not prejudice the registrants. Indeed, even where there is the possibility of prejudice as a result of ambiguities in the Department's advice letter, courts have refused to place their imprimatur on the board's denial of an exemption. As one court concluded, such "a key determination so fraught with doubt cannot be adequate ground for conviction upon a grave criminal charge" *United States* v. *Englander,* 271 F. Supp. 182, 184 (S.D. N.Y. 1967); *see*

also United States v. *Bova,* 300 F. Supp. 936 (E.D. Wis. 1969).[20]

In the present case, therefore, where the appeal board may have relied upon the erroneous advice of the Department of Justice in denying petitioner's conscientious objector claim, the integrity of the Selective Service System requires that his conviction be reversed and the indictment dismissed.

[20] In *Bova* the hearing officer had reported that the registrant had been *a religious* for a time while he attended Catholic seminaries; that he had later displayed an interest in civil rights movements; and that his claim appeared to be based upon his own religious beliefs and not upon Roman Catholicism (300 F. Supp. at 938). The Department, however, wrote that the hearing officer "reported that the registrant was born and reared a Roman Catholic and was religious for a time . . . but thereafter became interested in civil rights movements . . . [and] that registrant's claim for exemption appeared to be based not upon adherence to Roman Catholicism but that he appeared to be sincere in his own belief that he is a conscientious objector . . ." (300 F. Supp. at 939). The court acquitted the registrant on the ground that the Department had conveyed the erroneous impression to the appeal board that the registrant had at one time been a religious person but had abandoned his religion for "civil rights movements." Because of the importance of a registrant's religious beliefs for the conscientious objector exemption, the court concluded that "the erroneous view of the defendant's beliefs that is conveyed by the Justice Department recommendation is by its very nature material" (300 F. Supp. at 941).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the case remanded to the District Court with instructions to dismiss the indictment.

Respectfully submitted,

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